United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6041

To be argued by
MARY C. DALY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6041

MICHAEL McDEVITT,
Plaintiff-Appellant,

—v.—

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE, CASPAR WEINBERGER, Secretary of Health, Education and Welfare

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee, Caspar Weinberger, Secretary of Health, Education and Welfare.

MARY C. DALY,
STUART I. PARKER,
Assistant United States Attorneys, Of Counsel.

UNITED STATES COURT OF APPEALS
FILED
JUL 2 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6041

MICHAEL McDEVITT,
Plaintiff-Appellant,

—v.—

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE, CASPAR WEINBERGER, Secretary of Health, Education and Welfare

Preliminary Statement

The plaintiff-appellant Michael McDevitt appeals *pro se* from an Order of United States District Judge Charles Stewart entered on October 2, 1975 granting defendant-appellee's motion for summary judgment. The District Court held that the decision of the Appeals Council of the Social Security Administration that the plaintiff was at fault in creating an overpayment of disability payments and that the recovery of the overpayment should not be waived was supported by substantial evidence.

Issues Presented

1. Whether the decision of the Secretary that the appellant was at fault in creating an overpayment of

disability payments and that recovery of the overpayment could not be waived was supported by substantial evidence.

2. Whether the absence of counsel, a right voluntarily waived by appellant, deprived him of a fair hearing.

Statement of Facts

The plaintiff-appellant, Michael McDevitt ("McDevitt") is a thirty-one year old stone cutter. He filed an application for disability insurance benefits on November 24, 1967 (Tr. 53-56)* and was subsequently notified by the Bureau of Disability Insurance that he had been found disabled as of April 28, 1967. Appellant was diagnosed to be suffering from status post basal skull fracture with loss of hearing on the left and vertigo (Tr. 58). After a two year period of unemployment, he returned to work on June 3, 1969 and, as required by an agency regulation (20 C.F.R. § 404.1531), he reported his resumption of labor to the Social Security Administration on June 13, 1969 (Tr. 82). Again complying with the same agency regulation, on January 22, 1970, he advised the Social Security Administration that his employment had ended on August 22, 1969, was resumed on October 24, 1969 and stopped again on January 20, 1970 (Tr. 88-89). Appellant admittedly returned to work on March 18, 1970. There is, however, no record of any written or oral notification by him reflecting this fact until May 13, 1971, when he replied to an inquiry from

---

* "Tr." followed by a page number refers to the transcript record before the Social Security Administration, a certified copy of which was filed as part of the Secretary's answer to the Complaint in the District Court pursuant to 42 U.S.C. § 405(g). Four copies of the transcript have been filed with this Court and designated as exhibits pursuant to Rule 30(e) of the Federal Rules of Appellate Procedure.

the Social Security Administration (Tr. 90-93).* Because of appellant's failure to notify the Social Security Administration of his March 18th resumption of work, he continued to receive disability benefits through June, 1971.

Upon being advised of appellant's return to work the Social Security Administration reviewed his file and determined that his period of disability and entitlement to disability insurance benefits had, in fact, terminated with the end of July, 1970, that he had been erroneously overpaid for the months of August, 1970 through June, 1971 in the amount of $1,921.20 and that recovery of the overpayment should be demanded (Tr. 64). Appellant sought review of that determination and the request for refund was affirmed on reconsideration (Tr. 69-72). Appellant requested a hearing which was held on October 15, 1973 (Tr. 22-52). The Administrative Law Judge before whom appellant appeared considered the case *de novo* and on January 30, 1974, found that appellant was at fault in creating an overpayment and that recovery would neither defeat the purpose of the act nor be against equity or good conscience (Tr. 10-16). The decision of the Administrative Law Judge became the final decision of the Secretary when it was approved by the Appeals Council on May 21, 1974 (Tr. 6).

The appellant filed a complaint seeking review of the Secretary's determination on September 18, 1974. On October 2, 1975, the District Court (Stewart, *J.*) entered an Order granting the Secretary's motion for judgment on the pleadings and in an accompanying memorandum Opinion specifically found the Secretary's determination

---

* While the Appellant claimed to have notified the Social Security Administration of his resumption of labor (Tr. 29-33) the Administrative Law Judge concluded that he had not given such notification (Tr. 14-15).

to be supported by substantial evidence (a copy of the Opinion is annexed hereto as an Addendum). Appellant filed a motion to Proceed on Appeal in *Forma Pauperis* on or about November 19, 1976; the motion was granted four days later, and on January 6, 1976, the appellant filed a notice of appeal from the October 2nd Order of the District Court.

Relevant Statutes

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) provides in pertinent part:

> "The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . ."

Section 204 of the Social Security Act, 42 U.S.C. § 404 provides in pertinent part:

> "(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary . . . shall require such overpaid person . . . to refund the amount in excess of the correct amount . . .
>
> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United Staes from, any person who is without fault if such adjustment or recovery would defeat the purpose of this sub-chapter or would be against equity and good conscience."

Section 222 of the Social Security Act, 42 U.S.C. § 422 provides in pertinent part:

> "(c)(3) A period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits . . . .
>
> (4) A period of trial work for any individual shall end with the close of whichever of the following months is the earlier:
>
> (A) the ninth month, beginning on or after the first day of such period, in which the individual renders services (whether or not such nine months are consecutive); or
>
> (B) the month in which his disability (as defined in section 423(d) of this title) ceases (as determined after application of paragraph (2) of this subsection)."

Relevant Regulations

20 CFR § 404.506 provides in pertinent part:

> "Sections 204(b) and 1870(c) of the Act provide that there shall be no adjustment or recovery in any case where an incorrect payment under title II (. . . disability insurance benefits) . . . has been made (including a payment under section 1814(e) of the Act) with respect to an individual:
>
> (a) Who is without fault, and
>
> (b) Adjustment or recovery would either:
>
> (1) Defeat the purpose of title II of the Act, or
>
> (2) Be against equity and good conscience."

20 CFR § 404.507 provides in pertinent part:

> What constitutes fault . . . on the part of the overpaid individual . . . depends upon whether the facts show that the incorrect payment to the individual . . . resulted from:
>
> (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
>
> (b) Failure to furnish information which he knew or should have known to be material; or
>
> (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect."

20 CFR § 404.508 provides that:

> "(a) . . . Defeat the purpose of title II, for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:
>
> (1) Fixed living expenses, such as food and clothing, rent, mortgage payments, ultilties, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;
>
> (2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) . . . Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses."

20 CFR § 404.509 provides that:

"'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under title II or title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right . . . or changed his position for the worse . . . In reaching such a determination, the individual's financial circumstances are irrelevant."

20 CFR § 404.515 provides that:

(a) GENERAL EFFECT OF THE FEDERAL CLAIMS COLLECTION ACT OF 1966. Claims by the Administration against an individual for recovery of overpayments under title II . . . of the Act, not exceeding the sum of $20,000, exclusive of interest, may be compromised, or collection suspended or where such individual . . . does not have the present or prospective ability to pay the full amount of the claim within a reasonable time (see paragraph (c) of this section) or the cost of collection is likely to exceed the amount of recovery (see paragraph

(d) of this section) except as provided under paragraph (b) of this section.

(b) WHEN THERE WILL BE NO COMPROMISE SUSPENSION OR TERMINATION OF COLLECTION OF A CLAIM FOR OVERPAYMENT.—(1) OVERPAID INDIVIDUAL ALIVE. In any case where the overpaid individual is alive, a claim for overpayment will not be compromised, nor will there be suspension or termination of collection of the claim by the Administration if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of any other party having an interest in the claim. . . .

(c) INABILITY TO PAY CLAIM FOR RECOVERY OF OVERPAYMENT. In determining whether the overpaid individual is unable to pay a claim for recovery of an overpayment under title II . . . the Administration will consider such individual's age, health, present and potential income (including inheritance prospects), assets (e.g., real property, savings account), possible concealment or improper transfer of assets, and assets or income of such individual which may be available in enforced collection proceedings. The Administration will also consider exemptions available to such individual under the pertinent State or Federal law in such proceedings. . . .

(d) COST OF COLLECTION OR LITIGATIVE PROBABILITIES. Where the probable cost of recovering an overpayment under Title II . . . would not justify enforced collection proceedings for the full amount of the claim or there is doubt concerning the Administration's ability to establish its claim as well as the time which it will take to effect such collection, a compromise or settlement for less than a full amount will be considered. . . .

ARGUMENT

POINT I

There is substantial evidence in the record to support the finding that the appellant was at fault in creating overpayments within the meaning of Section 204(b).

It is well established that in reviewing cases of this nature the function of the appellate court " 'is not to reweigh the evidence but to determine whether there is substantial evidence to support the Secretary's determination" and "whether the Secretary used proper standards in reaching his decision.' " *Brown* v. *Finch*, 429 F.2d 80, 82 (5th Cir. 1970); *accord*, *Payne* v. *Weinberger*, 480 F.2d 1006 (5th Cir. 1973). *See also First National Bank of Fayetteville* v. *Smith*, 508 F.2d 1371 (8th Cir. 1974). No presumption exists in favor of the corrections of the district court's decision. *Knox* v. *Finch*, 427 F.2d 919, 920 5th Cir. 1970).

Consequently, it devolves upon this Court to determine whether there is substantial evidence in the administrative record to support the Secretary's determination. The classic definition of "substantial evidence" is found in *Celebreeze* v. *Bolas*, 316 F.2d 498, 501 (8th Cir. 1963) where Chief Justice Blackman, then a member of the United States Court of Appeals for the Eighth Circuit, wrote:

> " 'Substantial evidence is more than a mere scintilla * * *.' It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and it must be based on the record as a whole. National Labor Relations Board v. Columbian Enameling & Stamping Co., 1939, 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed.

660; Universal Camera Corp. v. N.L.R.B., 1951, 340 U.S. 474, 487-488, 71 S.Ct. 456, 95 L.Ed. 456."

Accord, Hofacker v. *Weinberger*, 382 F. Supp. 572, 575 (S.D.N.Y. 1974). The conclusive effect of the substantial evidence rule applies not only with respect to the Secretary's findings as to basic evidentiary facts, but also to inferences and conclusions drawn therefrom. *Levine* v. *Gardner*, 360 F.2d 727 (2d Cir. 1966); *Rodriguez* v. *Celebreeze*, 349 F.2d 494 (1st Cir. 1965); *Laboy* v. *Richardson*, 355 F. Supp. 602 (D.P.R. 1972).

There has never been any dispute in this action as to the fact that the appellant previously determined to be under a disability,* resumed substantial gainful activity in March, 1970 (Tr. 91). Nor has there ever been any dispute that he was overpaid the amount of $1,921.20 for the period beginning August, 1970 and ending June, 1971 (Tr. 64). The only question is whether appellant was without fault in creating the overpayment and, if so, whether recovery would defeat the purpose of the Social Security Act or be against equity and good conscience.

In order to encourage disabled individuals such as the appellant to resume work Congress provided for a nine month trial work period during which time a recipient of benefits is entitled both to work and to receive Social Security payments (42 U.S.C. § 422(c)). At the close of this period, any work performed by the claimant during the nine months may be considered by the agency in determining whether the disability has ceased (20 C.F.R. § 404.1536(a)); even if the recipient is found no longer subject to the disability, he is entitled to benefits for two

---

* The appellant is not contesting the determination that his disability has ceased (Tr. 26-27).

subsequent months. In appellant's case, his trial work period commenced on June 3, 1969 and terminated at the end of May, 1970.* He was entitled to, and in fact did receive, benefits for this period plus the two additional months of June and July, 1970. Recovery of overpayment is demanded only for the period August, 1970 through June, 1971 (Tr. 13, 16).

Section 204(b) of the Social Security Act (42 U.S.C. § 404(b)) specifically directs the Secretary to recover overpayments excepting only those instances in which the recipient was "without fault" *and* where recovery would "defeat the purpose" of the Act or "be against equity and good conscience." Each of these statutory phrases has been carefully defined in regulations promulgated by the Secretary. (20 C.F.R. §§ 404.506 to .509 (1974)). (See pages 6-7, *supra*). In a Section 204 hearing, considerations as to whether recovery would defeat the purpose of the Act or be against equity and good conscience enter into play *only* where the claimant is specifically found to be without fault. *Sierakowski* v. *Weinberger*, 504 F.2d 831, 835-36 (6th Cir. 1974); *Morgan* v. *Finch*, 423 F.2d 551, 553 (6th Cir. 1970).

"Fault" is defined in 20 C.F.R. § 404.507 as:

> "(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
>
> (b) Failure to furnish information which he knew or should have known to be material; or

---

* Appellant worked sporadically during this period. He was employed from June 3, 1969 to August 22, 1969, from October 24, 1969 to January 20, 1970 and from March 18, 1970 to some time after February 1971 (Tr. 13).

> (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect."

In the instant case, the Administrative Law Judge carefully questioned the appellant to determine the circumstances surrounding his apparent failure to advise the Social Security Administration of his resumption of work (Tr. 26-41). The Administrative Law Judge also inquired into his ability to discharge the overpayment (Tr. 41-52). He concluded, in an opinion affirmed by the Appeals Council that the appellant was not without fault in creating the overpayment.

Judge Stewart found substantial evidence in the record to support this determination. As Judge Stewart noted, there is no record of notification in any Agency file of appellant's March 18, 1970 resumption of work until May 13, 1971 when he replied to an Agency inquiry (Tr. 14, 29-33). Furthermore, McDevitt's testimony before the Administrative Law Judge that he reported his resumption of work to the Agency flatly contradicted his earlier representation that he had either forgotten to report his return to work or failed to report it because he believed it was only a temporary position (Tr. 14, 33-41). The record also contained other inconsistencies relative to appellant's true financial condition (Tr. 15) (See Opinion at 3-4).

It is well established that inasmuch as an administrative law judge has the opportunity to observe demeanor and determine credibility, his observations on these matters should be given great weight. *Johnson* v. *Richardson*, 329 F. Supp. 871 (W.D. Va. 1971), *aff'd*, 1 CCH UIR ¶ 16,626 (4th Cir. 1972); *French* v. *Richardson*, 324 F. Supp. 1152 (W.D. Va. 1971); *Finley* v. *Finch*, 311 F. Supp. 204 (W.D. Pa. 1970); *Vicars* v. *Gardner*, 285 F. Supp. 527 (W.D. Va. 1968); *Bailey* v. *Gardner*, 269 F.

Supp. 100 (S.D. W.Va. 1967). As Judge Stewart recognized, despite his own reservations concerning the administrative law judge's determination, a court should not substitute its judgment for an agency's where there has been full evaluation of plaintiff's claims (Opinion at 4-6); *Bledsoe* v. *Richardson*, 469 F.2d 1288 (7th Cir. 1972). The test is reasonableness not rightness, *Leibovici* v. *Secretary of Health, Education and Welfare*, 1 CCH UIR ¶ 14,057 (S.D.N.Y. 1974) citing 4 Davis, Administrative Law § 29.05.

Furthermore, even if the appellant had been found to be without fault by the Administrative Law Judge, he would also have had to demonstrate that recovery would defeat the purpose of the Act (*i.e.* deprive him of necessary living expenses) or be against equity or good conscience (20 C.F.R. §§ 404.507 to .509). Although appellant claimed to have heavy debts and expenses, he made no showing before the Administrative Law Judge that he and the Social Security Administration could not agree to a method of repayment consistent with his financial responsibilities and resources. Appellant now advises this Court of his alleged indigent status.* The Administrative Law Judge had, of course, no way of predicting appellant's current financial condition. He reviewed appellant's earning as they stood on the hearing date, October 15, 1973, and determined that recovery would not "defeat the purpose" of the Act.** If the appellant's financial condition has in fact changed, he is free to present evidence of this fact to the Social Security Administration and

---

* We note that properly speaking there is no evidence in the record or before this Court respecting appellant's present financial resources or income.

** Appellant submitted additional financial data to the Appeals Counsel (Tr. 8-9). While the Appeals Council considered the data, it nonetheless affirmed the Administrative Law Judge's determination (Tr. 6).

seek to compromise the claim pursuant to 20 C.F.R. § 404.515 (*supra* at 7) which authorizes the agency to agree to a repayment of a lesser sum where, *inter alia* there is no evidence of fraud or misrepresentation.*

In summary, the lack of any record in the district office, although appellant claimed that he gave both written and personal notice to the Agency, and the discrepancy between appellant's claim and his signed statement, as well as other discrepancies in his recollection which were noted both by the Administrative Law Judge and the District Court, provide ample evidence to support the Secretary's finding. The court should therefore affirm the Secretary's decision since it is supported by substantial evidence. *Hofacker* v. *Weinberger*, 382 F. Supp. 572 (S.D.N.Y. 1974); *Sciig* v. *Richardson*, 379 F. Supp. 594 (E.D.N.Y. 1974).

POINT II

Appellant waived his right to legal representation and in any event the absence of counsel did not prejudice appellant's rights.

As the appellant himself recognizes (Brief at 17), hearings conducted under the auspices of the Social Security Act are non-adversarial in nature. *Gold* v. *Secretary of Health, Education and Welfare*, 463 F.2d 38 (2d Cir. 1972); *Blanscet* v. *Ribicoff*, 201 F. Supp. 257 (W.D. Ark. 1962). The Notice of Hearing which summoned appellant to the October 15, 1973 hearing appraised him in bold face type and simple English of his right to be represented by counsel:

---

* The Social Security Administration has advised appellant that it would agree to a repayment schedule consistent with his financial condition (Tr. 69, 70) but the appellant has not responded to the agency's offer.

> "While it is not required, you may be represented at the hearing by an attorney or other qualified person of your choice, if you desire assistance in presenting your case." (Tr. 18).

The adequacy of this Notice was specifically sustained in *Steimer* v. *Gardner*, 395 F.2d 197, 198-99 (9th Cir. 1968). *Accord, Meola* v. *Ribicoff*, 207 F. Supp. 658, 665 (S.D.N.Y. 1962) (Edelstein, J.). Furthermore, the Administrative Law Judge advised appellant of his right to counsel at the very outset of the hearing (Tr. 18), and after short colloquy, appellant concluded "I'm making the decision to be by myself" (Tr. 24).

It is well established that while the Social Security Act permits legal representation at hearings conducted by administrative law judges the Secretary is not compelled, and indeed is not authorized, to provide counsel. *Jeralds* v. *Richardson*, 445 F.2d 36, 39 (7th Cir. 1971); *Vega* v. *Secretary of Health, Education and Welfare*, 321 F. Supp. 553 (D.P.R. 1970).

Where a claimant has received a fair and impartial hearing, the absence of counsel is not sufficient cause for remand. *Herridge* v. *Richardson*, 464 F.2d 198, 200 (5th Cir. 1972); *Domozik* v. *Cohen*, 413 F.2d 5, 9 (3d Cir. 1969); *Rushing* v. *Finch*, 310 F. Supp. 848, 851 (W.D. La. 1970). In the instant case, the Administrative Law Judge examined the facts surrounding the overpayment and appellant's ability to repay the sum (Tr. 24-52). In so doing, he fulfilled his duties precisely as this Court described them in *Gold, supra* at 43, *i.e.*, to "probe into, inquire of, and explore for all the relevant facts surrounding the alleged right or privilege" which is the subject of the law suit. The appellant's claim (Brief at 21) that the Administrative Law Judge did not give him an opportunity to explain discrepancies in his financial records is misleading. He specifically waived that right (Tr.

51). In any event, even if it were improper for the Administrative Law Judge not to inform the appellant of the specific additional records he was reviewing, it would make no difference in this case since the evidence adduced at the hearing, including appellant's own testimony, provided ample support for the determination of ability to pay. The additional evidence was merely cumulative.

Reduced to its essence, appellant's claim consists of nothing more than his disagreement with, and his disappointment in, the Administrative Law Judge's determination that he was at fault in creating the overpayment. Neither reversal nor remand can be predicated on such a basis, particularly where the record clearly establishes that appellant was advised of his right to counsel, that he elected to waive that right, and that the Administrative Law Judge conducted a comprehensive and fair hearing. The Court of Appeals for the Sixth Circuit when confronted with arguments not dissimilar to those advanced in the instant case said in *Cross* v. *Finch*, 427 F.2d 406, 408-09 (5th Cir. 1970):

> "We consider, finally, the claimant's argument that his lack of counsel at the administrative hearings requires a remand of this case to the Secretary. The record shows that Cross was given *written* notice that he could be represented by a lawyer of his choosing at the hearing and that he was *orally* informed of this fact at the hearing itself. He then chose to *forego* representation by a lawyer. We conclude that his lack of representation does not warrant a remand under the circumstances here. Cross received a full and fair hearing and there has been no showing of such a clear prejudice or unfairness to Cross caused by his lack of counsel as would warrant a reconsideration of his claims by the Secretary." (emphasis added).

We urge this Court to reach a similar conclusion.

CONCLUSION

It is submitted that the Secretary's determination is supported by substantial evidence and that the decision of the district court should therefore be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee, Caspar Weinberger, Secretary of Health, Education and Welfare.

MARY C. DALY,
STUART I. PARKER,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 3992

MICHAEL MCDEVITT,

Plaintiff,

—against—

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,

Defendant.

STEWART, DISTRICT JUDGE:

Petitioner McDevitt brings this action to review a final determination by the Secretary of Health, Education and Welfare ("H.E.W.") that petitioner was at fault in creating an overpayment of $1,921.20 in disability insurance benefits.[1] Petitioner argues that refund of any overpayment made to him should be waived as provided in 42 U.S.C. § 404(b):

> In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if

[1] After an initial demand for repayment by the Social Security Administration (Ex. 6), McDevitt requested and received a review and reconsideration (Exs. 9 and 10). After unfavorable decisions, the case was heard *de novo* by an administrative law judge who again found McDevitt at fault on January 30, 1974. That decision became the final decision of the Secretary when it was approved by the Appeals Council on May 21, 1974 (Tr. 6).

> such adjustment or recovery would defeat the purpose of this subchapter or would be against equity or good conscience.

Defendant has moved for judgment on the pleadings. Since we feel constrained to conclude that the determination was supported by substantial evidence, 42 U.S.C. § 405(g), see *Herbst* v. *Finch*, 473 F.2d 771 (2d Cir. 1972), we must grant defendant's motion and affirm the Administrator's finding.

Petitioner, a stone setter, suffered a skull fracture on April 28, 1967 and was subsequently found to be disabled as of that date. He received disability benefits thereafter. On May 6, 1969, his disability was found to be continuing, since he still suffered loss of hearing and vertigo (Ex. 4). In June 1969, petitioner returned to work. Nevertheless, on July 15, 1969, examination revealed that he was still disabled and payments of disability benefits continued.

At the time of his first disability payment, McDevitt was informed that he was required to report all work activity (Ex. 10). Forms were provided to him for this purpose. Petitioner reported his work activity to the district office of the Social Security Administration on June 13, 1969 by mail and again in person on July 9, 1969. On January 22, 1970, plaintiff submitted work information on the forms provided. He indicated that he had worked from June 3, 1969 through August 22, 1969 and again from October 24, 1969 through January 20, 1970. He was still entitled to disability benefits, however, and his payments continued (Ex. 10 at 72).

In April of 1971, petitioner was contacted by letter requesting all work information since January 1970. Plaintiff answered that response, stating that he had returned to work on March 18, 1970 and had worked

continually, with the exception of a two-month period. He further explained that he still suffered the symptoms of his disability and, as a result, had been reinjured in February 1971. The latter injury had resulted in his two-month work lapse.

At the hearing held before the administrative law judge on September 15, 1973, petitioner claimed that he had reported his return to work in March 1970 as he had upon prior occasions. That testimony, however, was in direct contradiction with an earlier signed form in which McDevitt stated that he had failed to report that return to work either because he believed it to be temporary or he had forgotten. At the hearing, petitioner explained the earlier contradictory written statement as one exacted from him under pressure. The judge found "the preponderance of the credible evidence" revealed that petitioner had failed to notify the administrative office of his March 1970 return to work.

We cannot say the judge's finding was without substantial evidence. The judge apparently relied heavily upon certain "discrepancies" in the record concerning the amount of income petitioner received and the amount of rent he paid. Some weight was also given to the absence of a work notification form from petitioner in the Administration's files. Finally, the judge had an opportunity to assess petitioner's demeanor at the hearing to evaluate his credibility which we, of course, are unable to do.

In granting defendant's motion, however, we observe that we would not necessarily have reached the same result upon the transcript and documentary evidence before us. We are impressed by certain elements in the record. First, we note the apparent forthrightness with which plaintiff volunteered to the judge at the hearing that his rent was less than the record indicated; also the

accuracy with which petitioner reported his previous employment to the Administration. In addition, when McDevitt received the questionnaire in April 1971, he reported all his employment from the January 1970 time requested. The judge drew an adverse inference from McDevitt's report. He thought that McDevitt at this point "might" have realized that his March 1970 work report had not been received, since the April 1971 request for information asked for all information since January of 1970. It seems to us that the judge expected too much of petitioner in this regard.

The most troublesome aspect of the case to us, however, is the demonstrated confusion in petitioner's mind concerning when he should or should not receive benefit payments. Before March 1970, McDevitt had sent in two work reports and, nevertheless, had continued to be entitled to and to be paid benefits. McDevitt apparently was aware that he was eligible to be paid benefits during a trial work period, but clearly had no idea how long that period should last. "I didn't know if I was going to get 9 or 2 years trial work period or 6 months, I had no idea." (Tr. at 4-5). He testified that he understood the period of benefit payments would be determined by the doctors who gave him periodic check-ups. He also testified that he telephoned the district office from time to time and enquired about his doctor appointments and was told not to worry "they'll notify you. They have you on record—you will be notified." (Tr. at 26).

Finally, we note that the judge's reliance upon the discrepancies between petitioner's written monthly income estimates and the social security record of income (compare exs. 20 and 35), while certainly not improper, is, to our mind, unfortunate. At the end of the hearing, the judge asked McDevitt whether he objected to the judge's use of McDevitt's financial records without McDevitt

having an opportunity to review them. Petitioner replied the judge was "more than welcome" to see his records. McDevitt was never in a position, therefore, to offer an explanation for the discrepancies relied upon by the judge.

Despite all of the above reservations which this court has concerning the Secretary's decision in this case, we are bound by the statutory standard provided in 42 U.S.C. § 405(g); we cannot say that decision was not based upon "substantial evidence." We therefore affirm that finding. We note for petitioner's benefit, however, that a finding of "fault" here in creating the overpayment can mean no more than a finding of "honest mistake." *Morgan* v. *Finch*, 423 F.2d 551, 553 (6th Cir. 1970). We think such is the case here.

So Ordered.

/s/ Charles E. Stewart
United States District Judge

Dated: New York, N. Y.
September 30, 1975.

★ U. S. Government Printing Office 1976-- 614—350—171

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-6041

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2nd day of July, 1976 she served two copies of the within Govt's Brief

by placing the same in a properly postpaid franked envelope addressed:

Mr. Michael McDevitt
30 Sickles Street
New York, New York 10040

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian L. Bryant

Sworn to before me this
2 day of July, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977